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No. 404

In the

Supreme Court of the United States

OCTOBER TERM, 1946

MEXICAN LIGHT & POWER COMPANY, LTD., *Petitioner*

v.

THE TEXAS MEXICAN RAILWAY COMPANY, *Respondent*

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT

CARL G. STEARNS,
CHAS. W. BELL,
Counsel for Petitioner

YOUNG CO., HOUSTON

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Preliminary Statement

The various contentions advanced in the Brief For Respondent were anticipated in the Brief for Petitioner. Although petitioner is firmly convinced that the complete want of merit in each and all of respondent's contentions and arguments has been demonstrated in the Brief for Petitioner, it is believed that this Reply is appropriate in view of several incorrect and unsupported assertions contained in the Brief For Respondent and in order to point out their incorrectness in the light of the Record. Likewise, petitioner will call attention to the want of applicability to the facts of this case of the authorities cited by respondent under its four Counter-Points.

Reply to Counter-Point One

The document sued on is fully supported by valuable consideration.

Although this case was tried entirely upon stipulations of fact, it appears to be the effort of respondent, in its brief, to inject into the case some character of factual controversy, where none exists. In so doing, respondent has made a number of incorrect assertions.

(1) On page 3 of Brief For Respondent the following statement is made:

> "* * * it is stipulated that this original bill of lading (the Sharon bill of lading) required Respondent to deliver the shipment to the Mexican lines at the international border line (R. 38)."

On pages 4, 12 and 16 of its brief, respondent repeats the assertion just quoted in somewhat different language and contends that petitioner "seeks to avoid the consequences of its stipulation that the original contract covered delivery to the boundary line * * *." (Brief For Respondent, page 4)

No such stipulation was made. The stipulation referred to is as follows:

> "That Fausto Trevino as agent did not pay to The Texas-Mexican Railway Company for carriage charges any other charges than those applicable from Sharon, Pennsylvania, to Laredo, Texas, which included placing the shipment at the international boundary line where it was delivered to the National Railways of Mexico." (R. 38)

The quoted stipulation speaks for itself. The matter stipulated relates solely to the payment of the carriage charges, which charges covered placing the shipment at the international boundary line. There is nothing in that stipulation or any other stipulation purporting to construe the original (Sharon) bill of lading or state its legal effect or requirements, and, specifically, there is no stipulation that such bill of lading "required respondent to deliver the shipment to the Mexican lines at the international border line", as contended by respondent.

From such nonexistent premise respondent argues:

> "Now, for the first time, Petitioner seeks to avoid the consequences of its stipulation that the original contract covered delivery to the boundary line by saying that it is contrary to the holding of the court in *Mexican Light & Power Company v. Pennsylvania Railroad Company*, 33 F. Supp. 483 (D.C., Pa., 1940), despite the fact that the stipulation was signed more than two years after the court handed down its opinion." (Brief for Respondent, page 4)

Throughout the entire course of this suit it has always been, and is now the position of petitioner that the legal effect of the Sharon bill of lading ceased upon the arrival of the shipment in Laredo. Such was the holding of the court in *Mexican Light & Power Company v. Pennsylvania Railroad Company*, 33 F. Supp. 483 (D.C., Pa. 1940)

Likewise, it has been the continued and consistent position of petitioner that the continuation of the shipment from respondent's yards in Laredo clear

to El Oro, Mexico, was under the bill of lading issued by respondent, under which it is liable as the initial carrier within the meaning of the Federal Statute involved.

(2) On pages 4 and 5 of its brief, respondent asserts that after the decision in the Pennsylvania case above referred to, it abandoned, in the instant case, its position embodied in its pleadings, that it was merely an intermediate carrier, and neither an originating nor delivering carrier.

The decision in the Pennsylvania case was handed down in 1940. Respondent's trial pleading in the instant case, denominated "Defendant's Fourth Amended Original Answer" was filed on December 9, 1943. (R. 9.) In such pleading, filed in this case some three years after the decision in the Pennsylvania case, respondent affirmatively alleges in at least three different places that it was merely an intermediate carrier. (R. 15, 17, 18.) Not only was this position not "abandoned" by respondent after the decision in the Pennsylvania case, but it was deliberately and affirmatively set out and reiterated in three separate portions of respondent's trial pleading filed over three years after the decision in the Pennsylvania case.

(3) On page 5 of its brief, respondent, still referring to its allegations in its trial pleading that it was neither an originating nor delivering carrier, but merely an intermediate carrier, states that since the decision in the Pennsylvania case, "Respondent never

urged the defense in the trial court or at any time thereafter."

There is nothing in the record to support the statement just quoted. The record is silent as to what was argued by respondent in the trial court, but respondent's trial pleading affirmatively shows that this was one of the many defenses urged by respondent and never "abandoned" by it.

(4) On page 7 of its brief, respondent asserts:

> "The statement made several times in petitioner's brief that the movement in Mexico was under the document issued by respondent is wholly without support in the record."

The stipulations of fact unequivocally establish that there were only two instruments involved in the entire transportation of this shipment from Sharon, Pennsylvania, clear to El Oro, Mexico. Neither respondent nor anyone else has ever even asserted that there was any other written instrument issued as a basis for any part of this transportation, and it is significant that respondent does not now venture the assertion that the Mexican Railroad issued any bill of lading, contract or receipt, or that the shipment moved on any instruments other than the Sharon bill of lading and respondent's bill of lading. Respondent never plead and never claimed that the Mexican Railroad issued any kind of written instrument.

Respondent ignores the rule that a written instrument imports a consideration and that a defendant, in order successfully to avail himself of the defense of

want or failure of consideration must not only plead, but must offer proof of want or failure of consideration. Although this fundamental doctrine is well settled in Texas, the Supreme Court of Texas seems to have lost sight of it in the instant case.

As stated by the court in *Kennedy v. Winfrey* (Tex. Civ. App., 1914) 163 S. W. 1018:

> "The law is well settled in this state that where a party admits the execution of an instrument, and then attempts to avoid it by showing a failure of consideration or otherwise, the burden is upon him to establish such defense."

Likewise, as held in the case of *Western Manufacturing Company v. Freeman* (Tex. Civ. App., 1910) 126 S. W. 924:

> "The burden of proof was upon the appellee to establish his plea of failure of consideration."

On page 8 of its brief, respondent asserts that petitioner failed to make any proof with respect to the fact that the Mexican lines issued no bill of lading or other document. Although no such proof by petitioner was necessary in order to meet respondent's mere pleading of want of consideration, unsupported by affirmative proof, the stipulations establish that the Mexican lines issued no document and such was the express finding of the Court of Civil Appeals in the instant case:

> "No contract of carriage was entered into between the appellant and the Mexican carrier, and none was necessary by reason of the method

adopted by appellant and appellee in effecting arrangements for further transportation of appellant's property to its ultimate destination in Mexico." (R. 52)

This finding of fact by the Court of Civil Appeals was not disturbed or even adverted to by the Supreme Court of Texas. This, for the reason that under the Constitution of the State of Texas and the uniform holdings of the Texas courts, the decision of a Texas Court of Civil Appeals is conclusive on all questions of fact brought before it. *Constitution of Texas,* Art. 5, Sec. 6; *American Fruit Growers v. Harlan-Elzey Randall Co.,* (Tex. Com. App.) 16 S.W.2d 261; *Reddell v. O'Fiel* (Tex. Com. App.) 6 S.W.2d 92.

Wholly aside from this affirmative finding of fact by the Court of Civil Appeals, it is inconceivable that a decision of this case could be predicated upon a supposed issuance by the Mexican Railroad of any bill of lading, contract or receipt, as any such decision would be based not only upon no evidence but upon no inferable deduction from the stipulated facts which expressly negative the issuance of any such imagined or suggested document. Likewise, it would be based upon no pleading. The holding of the Court of Civil Appeals in this case is fully supported by the stipulations establishing that the entire haul of the shipment was upon the Sharon bill of lading and respondent's bill of lading, and upon them alone.

The several elements of consideration supporting respondent's issuance of the bill of lading sued on are fully discussed in petitioner's brief (pages 15-29)

and repetition of the discussion is unnecessary. Respondent has not disputed the controlling fact that it received, and petitioner paid to it, every cent which could legally be paid for respondent's participation in the shipment, irrespective of the manner in which respondent elected to handle the shipment.

Likewise, respondent's authorities do not support its contentions. The case of *Missouri, Kansas and Texas Ry. Co. v. Ward,* 244 U. S. 383 was discussed and distinguished on pages 21 and 22 of Brief for Petitioner. The cases of *Davis v. Cornwall,* 264 U. S. 560; *Chicago & Alton R. R. Co. v. Kirby,* 225 U. S. 155; and *Stevens v. Atchison, T. & S. F. Ry. Co.,* 202 N. Y. S. 195 cited on page 7 of Brief for Respondent neither have nor purport to have any bearing whatsoever on the matter of consideration. They are decisions dealing with the legal propriety of special agreements and rates, and the last two decisions are relied on by respondent in support of its contention that its issuance of the bill of lading sued on is illegal. (Pages 19, 23, respondent's brief.) They will, it is believed, be completely distinguished on that point in petitioner's Reply to Counter-Points Three and Four, *infra.*

Reply to Counter-Point Two

The shipment was "received for transportation" by respondent within the meaning of the federal statute involved.

Respondent, under its second counter-point, again incorrectly states that it was stipulated that the

Sharon bill of lading required respondent to make delivery of the shipment to the boundary line (brief, pages 12, 16). Apparently, respondent now bases all of its arguments upon this unsupported assertion.

A careful examination of the provisions of the controlling statute, copy of which is appended to petitioner's brief, is appropriate in considering the point here under discussion. The exact provisions of the statute require merely that a carrier receive the "property for transportation from a point * * * in the United States to a point in an adjacent foreign country * * *." There is no provision of the statute requiring that the property be "received for transportation" under the particular bill of lading under which it moves from a point in this country to a point in an adjacent foreign country.

It is respondent's contention that if respondent received possession of the shipment under the Sharon bill of lading, it simply could not "receive" the shipment "for transportation" within the meaning of the statute, because it could not "receive" the shipment "for transportation" under the Laredo bill of lading. (Brief for Respondent, page 14.)

We have found no decided case placing upon the statute the unwarranted construction sought by respondent and adopted by the Supreme Court of Texas. The only case cited either by respondent or in the opinion of the Supreme Court of Texas which is claimed to support such contention is *Georgia Southern & F. Railway Company v. Tifton Produce Company*, 176 S. E. 89 (Georgia, 1934), wherein the rail-

road sought to be held liable never handled the shipment or came into physical possession or contact with it under any bill of lading. This is conceded by respondent. (Brief, page 14.)

The construction of the statute contended for by respondent is not only strained, and unjustified by anything contained in the statute, but it would, if adopted, have the effect of ~~of~~ rendering the statute wholly ineffective in virtually every situation where the shipment involved moved on more than one bill of lading. That the courts have uniformly refused to permit any such result is best shown by the decisions cited and discussed on pages 25-29 and 31-33 of Brief for Petitioner, wherein initial carrier liability under the statute was imposed upon carriers under bills of lading issued subsequent to the movement of shipments under prior bills of lading.

Even were the construction of the statute urged by respondent to be held a proper one generally, it would not affect its liability in this case, inasmuch as it issued the Laredo bill after the legal effect of the Sharon bill had terminated, and physically initiated the shipment from its yards in Laredo to El Oro under the Laredo bill.

Respondent asserts that the bill of lading sued on is "equivocal." (Brief, pages 12, 24.) In what respect it is "equivocal," respondent does not indicate. None of the courts below so regarded it, and the Court of Civil Appeals held it to be very clearly unequivocal. Even if it were actually equivocal, or even ambiguous, any doubt as to its provisions would, under settled

rules of construction, be resolved against the carrier which issued it. This was the direct holding of the Commission of Appeals of Texas in the case of *Gulf, C. & S. F. Ry. Co. v. Hines, et al*, 250 S. W. 1013, which was a case imposing initial carrier liability upon a railroad company in an interstate shipment. The court held:

> "It is a well-established rule under the federal authorities that, if there be any reasonable doubt as to the proper construction of a bill of lading, it should be resolved against the carrier. It follows from these conclusions that under the federal statute the plaintiff in error was liable for the entire loss and damage caused by it and its connecting carriers."

It is submitted that respondent's contentions under Counter-Point Two are without merit.

Reply to Counter-Points Three and Four

The issuance by respondent of the bill of lading sued on was not unlawful, and no unlawful rebate or discrimination is involved.

Petitioner, on pages 33-36 of its brief, has called to the attention of the Court the many decisions establishing that the issuance of the bill of lading sued on in this case is not illegal and further, that even if it were held to be illegal, recovery in this case would not thereby be defeated. The settled rules established by those decisions are controlling of the situation here involved, and respondent's effort to distinguish those decisions is unavailing.

Respondent states that it did not violate or intend

to "violate any law by issuing the document it did." (Brief, page 23.) Further, respondent concedes "that the Commission has no jurisdiction to require the establishment of joint through rates from points in the United States to points in adjacent foreign countries" (Brief, page 19) and that there has never been filed or published "a through rate from Laredo, Texas, to El Oro, Mexico." (Brief, page 18.) It is difficult, in view of the settled principles which respondent is obliged to recognize, to follow its argument that its acts here involved are somehow tainted with illegality, and that if it be held liable in this case, petitioner will have obtained "an unlawful rebate."

Respondent's authorities referred to on pages 18-23 of its brief are not to the point. In *J. H. Hamlen & Sons Company v. Illinois Central Railroad Company*, 212 Fed. 324, (cited page 19, Brief for Respondent) the shipper sought to recover damages from a rail carrier where the carrier had in error quoted a rate less than the published rate, and the court held that the published rate controlled. The case was decided before the 1915 Amendment of the Act making rail carriers liable for a loss on a connecting carrier in an adjacent foreign country. In this connection we again refer the Court to the discussion of the history of the statute involved set out in *Alwine et al v. Pennsylvania R. Co.*, 15 Atl.2d 510, wherein the court expressly points out the amendment of the Act after the decision in the *Hamlen* case.

In *Stevens v. Atchison, Topeka & Santa Fe Ry.*

Company, supra, (cited page 19, Brief for Respondent) the action was brought to determine whether or not rail carriers were entitled to rail freight or whether the railroad ocean freight was one entity and that carriers were not entitled to any freight because the entire transportation from New York to Japan had not been completed. The court held that the rail carriage had been completed, and that as the rail rate was separately stated, the rail carriers were entitled to the railroad freight. These decisions do not support respondent's contention that its issuance of the bill of lading was violative of Section 6 of the Interstate Commerce Act.

In *Southern Railway Company v. Reid,* 222 U. S. 424 (cited on page 19, Brief for Respondent) the point decided was that as Congress had legislated with respect to interstate commerce, the State of North Carolina could not impose a penalty involving interstate commerce. The court in that case denied the plaintiff recovery for the penalty provided in the state statute, not because the railroad's refusal to transport was justified, but because the State of North Carolina was by its statute interfering with interstate commerce.

In *Chicago & Alton R. R. Co. v. Kirby, supra,* (cited page 23, Brief for Respondent) the railroad's agent had made an agreement to expedite a shipment which was unauthorized by a tariff. All the court there held was that such an agreement, unauthorized by a tariff, was unenforceable.

It is submitted that the bill of lading involved is valid and enforceable.

Conclusion

Respondent contends that its liability in this case is "vicarious." Its liability in this case is no more "vicarious" than is the liability of any other initial carrier within the meaning of the statute involved. It is submitted that the provisions of the statute apply in this case and that the Supreme Court of Texas was in error in not applying them.

The prayer of petitioner's main brief is here respectfully reiterated.

Respectfully submitted,

Carl G. Stearns

CARL G. STEARNS,

Chas. W. Bell

CHAS. W. BELL,

Counsel for Petitioner